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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

*Defendants-Appellants,*

*against*

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

*Plaintiffs-Appellees.*

## BRIEF FOR APPELLANTS

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*Defendants-Appellants,*

*against*

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

*Plaintiffs-Appellees.*

## BRIEF FOR APPELLANTS

Defendants, the Commissioner and the Department of Social Services of the State of New York, appeal from two orders of a statutory three-judge Court of the United States District Court, Southern District of New York (HAYS, C. J., MANSFIELD, D. J. and MOTLEY, D. J.), entered September 12 and October 22, 1969 respectively. These orders preliminarily enjoin defendants from enforcing New York Social Services Law § 131-a insofar as that statute provides for a slightly higher monthly welfare allowance to welfare recipients within the City of New York than to those in the

remainder of the State. The first order (A. 125-A. 126)* applied only to recipients of aid to the aged, blind and disabled (herein "AABD"). The second (A. 164-A. 166) permitted intervention by recipients of aid to families with dependent children (herein "AFDC") and applied the preliminary injunction to them as well.

## Opinions Below

The opinion of the District Court (MOTLEY, J.) granting plaintiffs' motion to convene a three-judge court dated July 7, 1969 is not reported, but is set forth in the Appendix at A. 35-A. 36.

The opinion of the three-judge District Court granting the preliminary injunction is reported at 303 F. Supp. 339 and is set forth in the Appendix at A. 103-A. 124. No opinion was entered in support of the order granting intervention to plaintiffs Jones and Harvanek.

## Jurisdiction

The order granting the preliminary injunction was entered September 12, 1969 and defendants' notice of appeal was served and filed October 10, 1969.

The order granting the application of plaintiffs Jones and Harvanek for leave to intervene on behalf of their class of AFDC recipients, and extending the preliminary injunction to their class, was entered October 22, 1969 and defendants' notice of appeal therefrom was served and filed October 24, 1969.

By stipulation dated October 24, 1969, all parties consented to the consolidation of these appeals.

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* Numbers in parentheses preceded by "A." refer to pages of the Appendix.

On October 22, 1969, the date of the second order, defendants applied for a stay of the two orders. This application was argued before the statutory three-judge court on October 27, 1969 and the Court denied the stay in open court.

On December 10, 1969 Mr. Justice HARLAN denied appellants' application for a stay pending disposition of the appeal in this Court without prejudice to defendants' application for an accelerated hearing of this appeal.

An application for an accelerated hearing was made on December 17, 1969. That application was never formally ruled on but an accelerated schedule of briefs was agreed upon by the parties in order for this Court to hear argument this term.

Probable jurisdiction was noted on February 24, 1970.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

## Statute Involved

New York Social Services Law § 131-a* in pertinent part provides:

> "1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available

* Section 131-a was enacted on March 31, 1969 to take effect on July 1, 1969 by L. 1969, ch. 184. Subdivision 4 was added to § 131-a by L. 1969, ch. 411, enacted May 2, 1969, effective July 1, 1969.

income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

| One | Two | Three | Four | Five | Six | Seven |
|---|---|---|---|---|---|---|
| $70 | $116 | $162 | $208 | $254 | $297 | $340 |

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

| One | Two | Three | Four | Five | Six | Seven |
|---|---|---|---|---|---|---|
| $60 | $101 | $142 | $183 | $225 | $257 | $290 |

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such dis-

trict, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

## Questions Presented

1. Are the issues of the validity of New York Social Services Law § 131-a under the equal protection clause and its conformity to the Social Security Act ripe for federal judicial determination where an aggrieved welfare recipient has an expeditious remedy available in the State to compel the Commissioner of Social Services to increase the allowances for each county, and where the state courts have never interpreted the new statutory scheme and neither the state courts nor the Department of Health, Education and Welfare have yet passed on the conformity of the statute to the Social Security Act?

2. Does § 131-a, which provides monthly allowances for welfare recipients (exclusive of rent and fuel for heating) at schedules slightly higher for recipients residing in the City of New York, create a legislative classification so arbitrary as to be violative of the equal protection clause?

The Court below answered "yes" to both these questions.

## Statement of the Case

Essentially, this case concerns the authority of the New York State Legislature to make slightly higher payments to its almost 900,000 welfare recipients concentrated in New York City than it pays to the 323,000 recipients dispersed throughout the rest of the State.

**A. Public Assistance in New York Before 1969.**

This litigation was brought in response to new legislation which, for the first time, set the standards of assistance by statute, rather than by administrative provision, and greatly simplified those standards. Payment to welfare recipients is disbursed in monthly allowances to provide for maintenance at the established standard of need for all such recipients. Social Services Law §§ 131, 131-a. These allowances are the same in New York regardless of the category of aid (AFDC, AABD, etc.) given the recipient. The amounts paid are exclusive of rent and fuel for heating, which are separately paid to each recipient. Before the effective date of the new statute, July 1, 1969, the levels of welfare allowances were set by the Commissioner of Social Services pursuant to a broad statutory standard, to wit (Social Services Law § 131):

> "Insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves.
>
> • • •
>
> A principal consideration in determining the adequacy of assistance and care shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities."

Thus, the Commissioner established items of basic need and levels of payment to cover those items from year to year based on cost-of-living surveys made by his Department and other agencies such as the Bureau of Labor Statistics. The State was divided into three zones for welfare-allowance purposes and allowances varied slightly between these zones. The levels which were established following the August, 1968 survey are as follows (statistics for family of four, excluding rent and fuel):

| | |
|---|---|
| SA-1 District—$152-221 | Includes: New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties |
| SA-2 District—$149-218 | Includes: All counties not in SA-1 or SA-3 |
| SA-3 District—$146-215 | Includes: Allegany. Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties |

These $3-per person differences hinged on local variations in the average cost of utilities. The variation within each region depended on the age of the oldest child in each family.

**B. The 1969 Legislation.**

In 1969 the Legislature enacted Social Services Law § 131-a, which established statutory allowances and abolished differentials based on the age of the oldest child. These allowances, which became effective July 1, 1969, provided for $208 per month for a family of four in the City of New York (again exclusive of rent and fuel) and $183 in the remainder of the State. The levels paid to each size family pursuant to § 131-a are based on the amounts paid under the then most recent August, 1968 re-pricing.

On May 2, 1969 the Legislature amended § 131-a (4) so as to authorize the defendant Commissioner of Social Services to "promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established," but not to exceed the level provided for recipients in the City of New York, "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." The amendment expressly authorizes a county social services official to apply for such increase in allowances.

Soon thereafter, on June 5, 1969, the Commissioner, acting pursuant to the amended § 131-a(4), promulgated a regulation (18 NYCRR § 352.4) which revised the schedule of allowances for the counties outside the City of New York which had formerly been within the SA-1 zone*, and increased the monthly allowance from $60 to $65 for an individual recipient and from $183 to $191 for a family of four. (The comparable figures within the City of New York are $70 and $208.)** This administrative action sharply reduced the differential between the allowances which were to be paid within and outside the City of New York effective July 1, 1969.

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* Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties. These counties are presently designated "SA-2" (18 NYCRR § 352.4).

** The following table shows the monthly allowances for the various parts of the State of New York before and after the advent of § 131-a.

*Before July 1, 1969:*

SA-1 (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $66 | $94-110 | $125-156 | $152-198 | $180-238 | $204-274 | $234-354 | $262-395 | $293-437 | $320-464 |

SA-2 (All counties not in SA-1 or SA-3)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $63 | $91-107 | $122-153 | $149-194 | $176-234 | $200-270 | $230-350 | $259-391 | $289-433 | $317-460 |

SA-3 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $60 | $88-105 | $119-150 | $146-192 | $173-231 | $197-267 | $226-346 | $255-387 | $284-429 | $312-456 |

*July 1, 1969 and after:*

SA-1 (New York City)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $70 | $116 | $162 | $208 | $254 | $297 | $340 | plus $43 for each additional person | | |

SA-2 (Dutchess, Greene, Monroe, Suffolk, Ulster and Westchester Counties)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $65 | $107 | $149 | $191 | $233 | $270 | $307 | plus $37 for each additional person | | |

SA-3 (All counties not in SA-1, 2 or 4)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $62 | $104 | $146 | $188 | $230 | $267 | $304 | plus $37 for each additional person | | |

SA-4 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

| *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* |
|---|---|---|---|---|---|---|---|---|---|
| $59 | $101 | $143 | $185 | $227 | $264 | $301 | plus $37 for each additional person | | |

By bulletin dated Sep. 25, 1969, allowances of AABD recipients, state-wide, were increased $8 per month for persons living alone and $5 for persons living with families, pursuant to a demonstration project.

This administrative change restored welfare recipients almost precisely to the level of assistance they were receiving prior to the legislative enactment. Thus, Nassau and Westchester County individual welfare recipients received a basic allowance of $66 before the legislative change and $65 afterwards. For the average family of four in those counties receiving welfare payments the amount received remained precisely the same. Such a family of four (with an eldest child of the mean age of 10.9 years) was receiving $191 prior to the new legislation and the Commissioner's regulation set the allowance at precisely that amount.

**C. *Rosado* v. *Wyman* and the Unripeness of This Case.**

By order to show cause dated April 9, 1969, *Rosado* v. *Wyman** was instituted in the Eastern District of New York, attacking § 131-a on two grounds. In the first place, it was alleged that § 131-a conflicted with 42 U.S.C. § 602(a)(23), a section of the Social Security Act governing the eligibility of states for grants in aid under the AFDC program. Secondly, it was contended, just as in the instant case, that establishment of slightly higher levels of payments to recipients within New York City denied equal protection to suburban recipients and conflicted with 42 U.S.C. § 302 (a) (1)—the identical claims here alleged.

A three-judge court was convened in *Rosado* pursuant to 28 U.S.C. § 2281 upon the motion of the defendants State Department and Commissioner. Following the May 2nd amendment of § 131-a(4) that Court dissolved itself (by order dated May 12, 1969) on the ground that the amendment had mooted the equal-protection issue. 304 F. Supp. 1354, 1356:

> "Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York

* 304 F. Supp. 1354, 1356, 1381 (E.D.N.Y. 1969), aff'd in part and reversed in part 414 F. 2d 170 (2nd Cir. 1969), *sub judice* here (No. 540, Oct. Term 1969).

may—either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding."

The dissolution of the three-judge court in *Rosado* was affirmed by the Court of Appeals, Second Circuit, on July 16, 1969 (414 F. 2d 170). The majority opinion by Judge HAYS held that any determination by the three-judge court "would have been premature" and that "[t]he Court was right in refusing to act on facts that were fluid and subject to early change." It noted that it was "confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development." *Rosado* is presently *sub judice* in this Court, having been argued on November 19, 1969. The propriety of the dissolution of the three-judge court was among the points appealed by the petitioners (plaintiffs below).

**D. The Instant Litigation.**

Almost immediately after the Commissioner had announced his new schedules pursuant to § 131-a(4) the in-

stant litigation, precisely duplicating the claim in *Rosado*, was instituted by residents of Nassau and Westchester Counties for a judgment declaring that § 131-a was invalid. They claimed that the differential in assistance levels (1) denied them the equal protection of the laws, (2) and also violated both § 42 U.S.C. § 302(a)(1), which requires a State plan to "be in effect in all political subdivisions of the state," and a regulation of the United States Department of Health, Education and Welfare (herein "HEW"), 45 CFR § 233.20(a), which provides that state welfare programs "[s]pecify a Statewide standard" which "will be uniformly applied throughout the State" (A. 4, A. 11, A. 15). The plaintiffs, recipients of aid to the aged, blind and disabled, also sought an injunction against enforcement of the statute, only "on the ground that said grants and schedules are in violation of and inconsonant with the requirements of the federal Social Security Act and regulations * * *" (A. 19). The complaint sought no permanent injunction on the constitutional claim.

The action was instituted although *Rosado* v. *Wyman, supra,* was then on appeal to the Court of Appeals for the Second Circuit, although no county official had sought an increase of assistance standards as specifically authorized by § 131-a(4) and although no Article 78 proceeding had been instituted pursuant to the three-judge Court's decision in *Rosado.*

Contemporaneous with the institution of this action, on June 27, 1969, the Nassau County Commissioner of Social Services, with the approval of the local legislative body, applied for increased levels of payment to the Commissioner. This application was not ruled on because of the pendency of the instant litigation and became moot with the issuance of the preliminary injunction. On September 5, 1969 the Suffolk County Commissioner, with the approval of the local legislative body, applied for an increase in the level of payments to the recipients within his

county. That application similarly became moot with the issuance of the preliminary injunction. As of this date Westchester County has never applied for an increase nor have any other formal applications been received from Departments elsewhere in the State. Nor has any welfare recipient in either of those counties—or any other—instituted any proceeding to review the denial or to direct any county to apply for an increased level of allowances.

Together with service of their complaint here, plaintiffs moved before CONSTANCE BAKER MOTLEY, J. for a preliminary injunction on both the Constitutional and statutory claims. Defendants opposed both, on the merits and on the ground that the dissolution of the three-judge court in *Rosado* was dispositive here. Appellants were afforded no opportunity to present evidentiary material or even a memorandum of law on the propriety of the application to convene the three-judge court.

On July 7, 1969 the District Court granted the plaintiffs' application to convene the three-judge court (A. 35-A. 36) and argument was had before that Court (HAYS, C.J., MANSFIELD, D.J. and MOTLEY, D.J.) also immediately thereafter, on July 17, 1969. After the designation of the three-judge panel the District Court signed an *ex parte* order to take the deposition of defendant Commissioner Wyman. That deposition was held on July 15, 1969 (A. 40-A. 90).

On August 4, the Court decided to issue a preliminary injunction against implementation of § 131-a "other than according to objective, non-discriminatory standards based upon the cost of the needs of [welfare] recipients" (A. 120). It also denied defendants' motion for summary judgment and directed a trial (A. 120), which was adjourned pending disposition of this appeal. The order pursuant to this decision was signed on September 12, 1969 (A. 125-A. 126).

Thereafter plaintiffs Jones and Harvanek applied, by order to show cause dated October 6, 1969, to intervene on

behalf of AFDC recipients outside the City of New York (A. 127-A. 157). The Court granted such intervention over appellants' objection and, by order dated October 22, 1969, extended the preliminary injunction to them (A. 164-A. 166).

## The Decision of the Three-Judge Court

The sweeping injunctions issued by the three-judge court rested on a finding that § 131-a violates the Equal Protection Clause. The Court did not reach the question of compliance with the Social Security Act (See *Rosado* v. *Wyman, supra*), deferring in favor of an administrative determination by HEW.

The Court conceded that the three-judge court in *Rosado* had before it the same issue and had dissolved itself. Yet it refused to follow that holding that the issue sought to be litigated here was not ripe for adjudication until there had been an opportunity for administrative action and an Article 78 proceeding* to review that administrative action or refusal to act. Instead, the Court stated that there had been administrative action "and it has failed to moot the issue", so that "[n]o reasons exist, therefore, for abstention" (A. 117).

In finding that § 131-a denied plaintiffs' right to equal protection the Court relied wholly on evidence of administrative practice and opinion in holding that the Legislature's action was without rational basis rather than

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* Article 78 of the Civil Practice Law and Rules of New York governs special proceedings which take the place of writs of mandamus, prohibition and certiorari. Such a proceeding is the available remedy to direct administrative action when such action is mandated by law, or to review an abuse of discretion by an administrative body. See *Matter of Schwab* v. *McElligott*, 282 N. Y. 182 (1940). It is a summary, expeditious proceeding and provides an ample remedy to plaintiffs here. Indeed, literally hundreds of Article 78 proceedings have been instituted in the past year or two seeking to review or compel administrative action by welfare officials.

relying on the language of the statute itself. In its injunction the Court did not distinguish between the statute which gave discretion to the Commissioner to raise the levels of assistance in other counties to meet New York City's and the administrative regulations of the Commissioner of the Department of Social Services which raised those levels but not to complete parity with those of the City.

The Court pointed out that the Department of Social Services did not, for reasons of impracticability, attempt to make a county-by-county cost survey of the items of basic maintenance (A. 106). It also noted that prior to the establishment of legislative standards the Department had divided the State into three geographical districts (A. 105). The Legislature did not perpetuate those districts. It established one level of assistance for the State outside the City and another level for New York City alone. The third fact on which the statutory court relied was the deposition of the Commissioner. The Court quoted him as "stat[ing] that he did not know why the Legislature differentiated between New York City and surrounding counties and that it was not done on his recommendation" (A. 106). The Court recognized that Commissioner Wyman had not proposed, drafted or approved the legislation. Nonetheless, the Court found that the Legislature, in distinguishing between the State's largest city, containing the largest number of welfare recipients, and the rest of the State, had acted irrationally despite the fact that it authorized the individual counties and the Commissioner to equalize payments if "the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule" (§ 131-a [4]).

In finding a denial of equal protection the Court egregiously disregarded the precept that constitutional issues are to be avoided if the case can be disposed of on other

grounds. It went on to overturn the strong presumption of constitutionality and carved out a special category of legislation, that dealing with welfare benefits. It denigrated and rejected out-of-hand the proof adduced by appellants that there was a higher actual cost of living to metropolitan residents not reflected in item-by-item specifications in the standard of need. It speculated as to the Legislature's motives and as to the material considered by it.

The end result was an assumption that in distinguishing between the 900,000 welfare recipients in New York City and the 300,000 recipients dispersed throughout the rest of the State the Legislature had created an "invidious" distinction (A. 113) requiring an injunction against enforcement of the statute even though the statute contains a built-in remedy for plaintiffs and even though the disparity in payments, even if it were of constitutional dimension, is the result of the administering of the statute, not the statute itself.

## Summary of Argument

The statute here under attack was held to be valid on its face by the three-judge court in *Rosado* v. *Wyman* because it allows any county in the State to raise its level of allowances to the level of allowance provided in New York City on a showing of a higher cost of living than that represented in its present level of grant. The Commissioner has the power to raise the level on his own motion or upon application by a local Social Services official with the approval of the local legislative body. Essentially what the Legislature did was to set a level of payments throughout the State and because it had knowledge of the need for higher allowances in the large urban center where the overwhelming majority of welfare recipients reside, a slightly higher level there. But it did not preclude any other county from being treated equally upon a showing

of need. No showing of need was made by individual recipients or officials in Nassau and Westchester Counties where the plaintiffs reside before they prematurely instituted this action. Thus, there has been no showing of a denial of equal protection. In any event, this case is plainly wanting in equity and unripe for disposition since the statute itself contains an avenue for prompt redress of any inequality such as plaintiffs assert. Plaintiffs should employ § 131-a to obtain the increase they seek, instead of attacking it.

What plaintiffs assert in this case is a claim that Nassau and Westchester Counties are more like New York City than they are like the rest of the State and therefore the distinction in the statute between New York and the rest of the State was "irrational." Needless to say, New York City is unique in many ways. It is true that there are similarities between suburban areas around it and the metropolitan center; but whether, in a given case, the surrounding counties should be included with the metropolitan center is a matter on which reasonable men differ with regularity. The forum in which they do and should differ is in the legislative body. New York City has a disproportionate share of the welfare recipients in the State. The City recipients actually receive lower allowances since the amounts for rent (paid separately) are considerably less than they typically are in the suburbs. The costs of City living, including cleaning and laundry supplies, security devices for the home and general maintenance of severely deteriorating housing and the greater need for recreation for children, is substantially higher than it is elsewhere in the State. Nonetheless, the statute allows proof to the contrary. The only place where proof to the contrary has been offered is in the federal court below. This is hardly an appropriate forum, at least in the first instance, for the evaluation of such data.

Only by presuming that the Legislature acted irrationally could the District Court have reached the conclusion

that § 131-a(4) violated plaintiffs' right to equal protection. It ignored the fact that no invidious discrimination could possibly be imputed to a scheme which gave its small advantage to City residents over suburban, a group including a higher proportion of minority groups over a group having a lesser proportion, a group including a higher proportion of recipients of AFDC over a group having a higher proportion of recipients in the other categories of aid. The Court in ignoring the presumption in favor of legislative validity also forgot that geographical distinctions are not inherently suspect. On the contrary it found everything about the state legislation and administrative action inherently suspect, giving every presumption to those who oppose the legislation, and ordered two sweeping and totally unwarranted preliminary injunctions.

## POINT I

### The issue sought to be litigated is unripe for federal judicial determination since the statute explicitly provides a state administrative remedy and there also is a speedy judicial remedy.

Section 131-a(4) specifically authorizes the Commissioner to raise the level of public assistance in counties outside of New York City to the level set for New York City recipients. That authority is given to the Commissioner on his own motion or upon application of a county social services official with the consent of the local legislative body. The level is to be raised "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." If the Court below was correct and recipients in Nassau and Westchester County have in fact demonstrated that the cost of living in those counties is higher than the schedules applicable there, then § 131-a itself contains a plenary remedy—in the case of Nassau County,

an Article 78 proceeding in the nature of mandamus to compel a decision on the county's application, and in the case of Westchester County, an Article 78 proceeding to direct that county to apply to defendant. No such suit has been brought.

Clearly, the statute may not be said to offend the equal protection clause if a county, or a recipient in a county, has the power under the statute (read with the CPLR provisions [§§ 7801 *et seq.*]) to redress any grievance based on this asserted inequality. It is not the statute, but the administrative determination made thereunder, to which these plaintiffs' objections should be addressed.

At the time this litigation was instituted the Commissioner was not presented in an administrative context with the factual allegations presented in the District Court. No county official had sought an increase. No recipient had sought to compel the Commissioner to raise the level in that county. Indeed, this new statute—still less than a year old—which is before this Court for the second time has never been interpreted by the state courts. Two broad attacks have been mounted in the federal courts and no individual or county official has ever walked up the steps of a state court building and sought to enforce the rights explicitly conferred by § 131-a(4). Resort to the state courts was required by the holding of the three-judge court in *Rosado* v. *Wyman*, 304 F. Supp. 1354 (E.D.N.Y. 1969). Its dissolution was affirmed by the Court of Appeals of the very Circuit in which the Court below sat.

In *Rosado*, the three-judge court specifically noted (304 F. Supp. 1354, 1356):

> "Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by the local Social Services officer with the consent of the local legislative body or upon the petition

> of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the States which refleflct differences in cost of living."

This order, affirmed by the Court of Appeals and presently itself on review here, specifically held that an available state remedy existed through the expeditious, summary route of an Article 78 proceeding. That remedy is presently available to the plaintiffs. Because of the lack of equity alone, the issuance of the preliminary injunction here was improper since the court below should have considered "whether plaintiffs have an adequate, untried remedy under State law." *Schumann* v. *State of New York,* 270 F. Supp. 730, 732 (S.D.N.Y. 1967). See also *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163. The Legislature properly provided that the Commissioner, the State official with experience and expertise in this field, with a staff of economists and statisticians and with an overall statewide view of the subject, should have the responsibility to determine the validity of applications to raise allowance levels of local units to the metropolitan level. There can be no "invidious discrimination" in a legislative scheme empowering the State Commissioner to create a statewide standard if in his judgment circumstances so warrant—with, as here, ample judicial review.

The Court below acknowledged the existence of this available state remedy but sloughed it off on the ground that it had "no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants" ( A. 117). This was, as we have seen, implausible in the context of the available state remedy, and amounted to a gratuitous slur on the courts of New York, which have been vigilant in protecting individual rights. The Court acted as though the administrative regulation issued by defendant Commissioner was the outer limit of his authority. But that regulation did not begin to ex-

haust his authority to redress any asserted differential under § 131-a (4) since at that time no official or any other person had brought evidence to the Commissioner to demonstrate the necessity for higher payments. The Court below, however, brushed aside this plain showing of unripeness. See Davis, Administrative Law, §§ 21.01 *et seq.*

Even if the Court mistakenly concluded the issue of constitutionality of the statute was ripe, it was totally improper for it to have refused to abstain until the state courts interpreted for the first time a newly-enacted state statute which had already been held to be valid on its face by the Court of Appeals in *Rosado.* Without any explanation the Court below proclaimed that this case was "Unlike the situation in *Harrison* v. *NAACP*, 360 U. S. 167 (1959) and *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), aff'd 386 U. S. 10 (1967)." In fact this case is precisely like *Harrison* v. *NAACP.* The plaintiffs there attacked a newly enacted state statutory scheme. Despite the fact that the claims involved an infringement on plaintiffs' First Amendment rights and invidious discrimination on the basis of race, this Court held that the scope of the new statutes must be interpreted first in the state courts.

Here, the District Court effectively denied the state courts any opportunity to interpret this new statute. Furthermore, since plaintiffs also seek relief on statutory grounds, the Court below should have avoided the constitutional questions. Instead, it amazingly veered toward the constitutional issue, not away from it. In *Fenster* v. *Leary, supra*, the plaintiff resisted the District Court's holding that he must resort to the New York courts in the first instance, but when he took the less travelled road to the state courts he got a favorable ruling far broader than any issued by federal courts to this date. *Fenster* v. *Leary*, 20 N. Y. 2d 309 (1967).

This case is a far cry from the situation presented in *Zwickler* v. *Koota*, 389 U. S. 241, also relied on by the Court below. In that case, this Court relied on the fact that the challenged statute could not be interpreted in a way which would avoid the difficult First Amendment issues. *Id.* at 249-50. However, it cited *Harrison* v. *NAACP, supra,* as continuing to control situations in which a state statute could be so construed, as is the case here. Here there is every likelihood that the state statute can be construed to avoid constitutional problems since it permits resolution of the disparity at the administrative level. See *Rosado* v. *Wyman, supra.*

The two other cases relied on by the Court (*Baggett* v. *Bullitt*, 377 U. S. 360, and *Dombrowski* v. *Pfister*, 380 U. S. 479) are also completely inapplicable. They both involve the special problem of a statute alleged to be so vague on its face as not to give notice which acts are prohibited and which acts are not. In such cases this Court found that a state court interpretation of the statute would have been futile. Moreover, both cases involved sensitive areas of alleged restrictions on First Amendment rights.

The fact is that, unlike the statutes attacked in the cases relied on by the Court below (*Damico* v. *California*, 389 U. S. 416; *Dombrowski* v. *Pfister*; *Zwickler* v. *Koota*), § 131-a explicitly establishes a means of obtaining an increase in welfare payments in any county, up to the New York City level. The existence of this safety-valve under the statute renders this attempt to invoke the equity jurisdiction of the federal courts premature. Like the oft-stated requirement that federal courts abstain where a challenged state statute is capable of a constitutional interpretation (*Harrision* v. *NAACP*, 360 U. S. 167) or where a state ground for invalidating the statute exists (*Reetz* v. *Bozanich*, —— U. S. —— [decided Feb. 25, 1970], 38 USLW 4170), this built-in avenue of redress should have dictated judicial restraint

on the part of the Court below. Instead, it extended its jurisdiction to the breaking-point, and strained to reach the constitutional question.

See also *McNeese* v. *Board of Education*, 373 U. S. 668, 673:

> "Where strands of local law are woven into the case that is before the federal court, we have directed a District Court to refrain temporarily from exercising its jurisdiction until a suit could be brought in the state court [citing cases]. Thus we have stayed the hands of a Federal District Court when it sought to enjoin enforcement of a state administrative order enforcing state law, since any federal question could be reviewed when the case came here through the hierarchy of state courts."

Since this statute involves no area in which distinctions are inherently suspect (e.g., race) and no area of peculiar federal responsibility (e.g., voting, interstate commerce), and since the constitutionality of the statute need not have been reached at all, the lower Court should have stayed its hand and allowed the courts of New York the first opportunity to define the scope of the State's new welfare legislation.

## POINT II

**The slightly higher allowance provided for welfare recipients residing in the City of New York is rationally based on the higher actual cost of living in the large metropolitan center where recreational facilities are typically distant and needs for laundry, locks, replacement of stolen money and items, and other components are greater. This provision has a rational basis and does not deprive plaintiffs of equal protection of the laws.**

The Court below improperly reversed the presumption of validity of the state statute—a presumption consistently expressed by this Court in the strongest terms (see *Ferguson* v. *Skrupa*, 372 U. S. 726)—and thrust the burden of proving its validity upon defendants, the State officials charged with its administration. In issuing these sweeping preliminary injunctions, the Court completely undermined the holding of this Court in *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809, that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Statutory distinctions between the City of New York and the remainder of the State are common to New York law and have been repeatedly upheld as against claimed denials of equal protection in a variety of contexts. See, *e.g.*, *Matter of Hogan* v. *Rosenberg*, 24 N. Y. 2d 207, 216-218 (1969), app. dism. *sub nom. Puryear* v. *New York*, October 13, 1969 (No. 336, Misc.); *People* v. *Baldwin*, 24 N. Y. 2d 207 (1969), *sub judice* U. S. Sup. Ct. (No. 188, Oct. Term 1969) (upholding statute permitting jury trial for misdemeanor prosecutions except in New York City); *Spatt* v. *City of New York*, 14 A. D. 2d 30 (2d Dept. 1961) (sustain-

ing New York City compensating-use tax, which taxed property purchased by City residents outside New York City at higher rates than property purchased within the City).

Indeed, this Court used as an example of a valid geographical distinction one between New York City and the rest of New York State when it was dealing with a question of equal protection brought under a statute from another state. *Missouri* v. *Lewis*, 101 U. S. 20, 31, cited with approval in *Salsburg* v. *Maryland*, 346 U. S. 545, 551 n.:

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the law."

The applicable rule in determining whether State enactments run afoul of the equal protection clause is whether there exists any rational basis for the classification. Only where the grounds employed by the State are "wholly irrelevant to the achievement of the State's objective" may the statute be struck down: *McGowan* v. *Maryland*, 366 U. S. 420, 425; *McDonald* v. *Board of Election Commissioners*, *supra*. See *Katzenbach* v. *Morgan*, 384 U. S. 641, 653:

> "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."

**A. The actual cost of living of a welfare recipient in New York City is in excess of that of a welfare recipient in the surrounding counties, and the Legislature was fully cognizant of this fact.**

The Legislature was confronted with an extreme difference in the depth and complexity of the social problems within its territory. New York City is unique in the nation in the sheer number of welfare recipients within its borders and in the documentation of the life-style of those recipients. See, *e.g.*, "A staff report submitted to Senator William E. Adams, Chairman, Joint Legislative Committee to revise the Social Services Law, State of New York—The increase in public welfare in New York City: The thirty months from January, 1966 to June, 1968", by Staff Consultant, Lawrence Podell, center for the Study of Urban Problems, Graduate Division Bernard M. Baruch College, The City University of New York (November 1968); "Report of Findings of Special Review of Aid to Families with Dependent Children in New York City," transmitted to the Committee on Ways and Means by HEW and the New York State Department of Social Services on September 24, 1969 (Committee Print [Committee on Ways and Means, U. S. House of Representatives 91st Cong. 1st Sess.]; U. S. Govt. Printing Office, 1969). At the time of the enactment of this statute, New York City had approximately 900,000 of the State's 1,200,000 recipients of public assistance. Thus the position of New York City's welfare recipients was well documented and thoroughly studied.

The Legislature also knew that housing costs for New York City recipients were by far the lowest throughout the State, so that in fact New York City recipients received *less* money than the average recipient outside the City, since rent and fuel for heating are paid separately, over and above the monthly allowance (A. 97). The average rent for a family of four in New York City in 1968

was $83. Yet plaintiff Rothstein's rent is $103.25 per month for herself alone in Nassau County (A. 98)—nearly $20 higher than the average rent for a family of *four* on welfare in the City of New York. Plaintiff Batson similarly receives $108 per month for rent for herself alone in Westchester County (A. 99-A. 100). The chief reason for the low cost of housing in New York City is the existence of rent control in that City. Concomitant with the lower cost of housing provided by rent control is also a higher cost of maintenance and security since, in addition to the far greater incidence of burglary and robbery in New York City (See pp. 28-29, *infra*), rent control has resulted in the deterioration of buildings in the City. A new study of the effects of rent control has just been completed by the New York State Urban Development Corporation (see *New York Times*, Feb. 13, 1970, p. 1, col. 3; p. 43, cols. 5-8; Feb. 18, 1970, p. 44, cols. 1-2), and soon will be published in a book entitled "Agenda for a City; Issues Confronting New York," Walsh and Fitch, Editors, in the Chapter "Housing: Economic Facets of New York City's Problems" by Dr. Frank S. Kristof (Caledonia Press). The conclusion of that recent study is that rent control has caused extraordinary deterioration and abandonment of buildings in New York City that is in fact not comparable to the housing situation anywhere else. *Id.* at page 12. This condition is, as might be expected, far more prevalent in the sections of the City where the majority of its welfare recipients are forced by circumstances to reside. Specifically, with regard to its effect on the very poor, Dr. Kristof states (*id.* p. 2):

> "Even though rent control today provides predominantly reasonable-cost housing to the elderly poor and to low-income Negro and Puerto Rican families of the city, the price being paid in the form of deterioration and abandonment clearly is proving too high."

And at page 38:

> "The analysis carried out in the foregoing pages has demonstrated unequivocally that rent control has succeeded thoroughly in holding down the cost of housing for low-income, for elderly, and for minority-group families. But the price being paid for the rent savings to these families is so great in terms of deteriorating and lost housing units withdrawn from the inventory that the apparent savings to the beneficiary families are being swamped by the capital losses accrued through deterioration and abandonments. Even the crudest calculus makes this clear. The present costs of proper maintenance and the difference between controlled and decontrolled rents suggest that the upper limit of free market rents for rent-controlled apartments would be an increase of about $24 a month or twenty-seven percent higher than present rents."

Thus, it is clear that if statutory rent control in New York City were abolished the cost to the state, city and federal government for housing of welfare recipients in the City would be considerably greater. Dr. Kristof estimated the projected cost to the Department of Social Services of increased rents for the first year after any repeal of rent control at $30 million, and financial assistance to such tenants in order to halt further deterioration of these buildings at $1.5 million (*id.*, Table 12, p. 45). Thus, it is clear that rent control, which exists only within the political boundaries of New York City, has, whatever its other virtues, helped create a difficult situation for welfare recipients there in terms of housing deterioration; and the money to cope even ineffectively with that deterioration must come from the monthly allowances to be paid to these welfare recipients, rather than their rent budget.

Furthermore, there is a substantial difference in the sales taxes paid in New York City and in Nassau and

Westchester Counties. The City tax is 3% plus 3% State tax, making a total of 6%. The same tax in Nassau County is 2% County tax and 3% State tax, making a total of 5%. Westchester County has no sales tax, except for the City of Yonkers, which has a 2% tax (increased to 3% effective March 1, 1970). See CCH State Tax Reporter, Vol. 2, ¶ 60-416, pp. 6623-25. This in itself constitutes a substantial component of the slightly higher cost of living found by the Legislature to exist— and a factor of which the Legislature was obviously aware.*

Finally, another component of the higher cost of living in New York City, with heightened impact on its welfare recipients, is its far higher crime rate than that of the surrounding counties. There are no published statistics of the total crimes in Westchester and Nassau Counties. The unpublished statistics of the New York State Department of Correction for the last year for which totals are available (1967) demonstrates the following: In 1967 there were reports of 45,611 crimes in Westchester County (10,986 felonies, 1,191 serious misdemeanors and violations, 33,434 less serious misdemeanors and violations). In Nassau County for the same period there were 43,806 complaints of crime (15,402 felonies, 577 serious misdemeanors and offenses, and 28,227 less serious misdemeanors). In New York City for the same period there were 798,913 reports of crimes (371,672 felonies, 17,742 serious misdemeanors and violations, 409,499 less serious misdemeanors and violations). The population of Westchester County in 1960 was 808,891, of Nassau County

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* The Internal Revenue Service considers the allowable average deduction for sales tax (for a family of four with income of $3,000-$3,999) to be $46 where the sales tax is 3% (as in Westchester), $77 where it is 5% (Nassau), and $92 where it is 6% (New York City). The difference attributable to sales tax alone between Westchester and New York City is thus $4 per month for a family of four at the poverty level. See 1969 Optional State Sales Tax Levels, U. S. Int. Rev. Service (instructions to Form 1040).

1,300,171 and of New York City at the same time 7,781,984. Even considering the population difference, it is clear that the sheer density of crime—especially of serious crimes—in New York City makes it a far more virulent (and costly) fact of life for the City welfare recipients than it is for their counterparts in the surrounding counties. This Court may take judicial notice of the fact that crime is costly (in terms of stolen goods and money, locks, etc.) and that crime is more prevalent in neighborhoods where welfare recipients are apt to live.

The effect of crime on New York City welfare recipients is acute and dramatic. In one typical month, March 1969, there were 18,860 special grants by the New York City Department of Social Services for stolen welfare checks, amounting to $985,480, as well as 2006 grants for stolen cash, amounting to $71,025. No statistics as to these thefts are even kept in the outlying counties.

Further, an overwhelming majority of welfare recipients in New York City receive AFDC (657,089 out of 880,262). Life for the child in the great urban center has particular characteristics. On the one hand he has free recreational facilities (parks, zoos, beaches, museums) and reasonably-priced transportation available. On the other hand, he does not have the casual recreation of safe play in the streets and yards—available in most areas outside New York City.* The Department of Social Services and Legislature were, or must be presumed, to have been, well aware of these facts which are almost truisms. The

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* As this Court may take judicial notice and as the Commissioner and Legislature were well aware, most New York City residents—and a substantially higher proportion of welfare recipients—live in apartments, many in congested areas with few playgrounds and often distant from parks. For example, the South Bronx areas of Mott Haven, Hunts Point and Morrisania, in which tens of thousands of welfare recipients live, consist almost exclusively of tenement buildings, with almost no private houses, and do not contain a single park of appreciable size.

slightly increased grant to New York City recipients was a legislative recognition of this fact. This purpose was expressed by defendant Commissioner Wyman precisely (A. 59):

> "The essential difference is in the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the extent, certainly not the components of the urban living requirements."

This precise testimony by the State official whose professional experience and expertise have been addressed to these very problems, in addition to that contained in the affidavit submitted by the defendants (A. 92-A. 104), is the only evidence of legislative intent in this record. It provided far more than the requisite rational basis for the statutory distinction here questioned. What New York here did was "[i]n acceptable legislative fashion," to "limit its attention to the geographic areas where immediate action seemed necessary." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328.

### B. The Court below impermissibly carved out a more rigorous standard for statutes relating to welfare allowances.

The Court below, incredibly, sloughed off all this proof as no more than an "assumption" which "we find ourselves unable to accept" (A. 115). It impermissibly substituted its own opinion for that of the Legislature. See *Ferguson* v. *Skrupa*, *supra*, 372 U. S. at 728-730; as well as the extremely apt language of *Snell* v. *Wyman*, 281 F. Supp. 853, 862, 863 (S.D.N.Y. 1968), aff'd 393 U. S. 323:

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not

approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.

Against plaintiffs' views, as defendants point out there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us. * * *

It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 59 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. * * *

The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality."

Judge MANSFIELD's opinion, in denigrating and in effect disregarding the *only* evidence of legislative intent in the record, suggested that the aged, blind and disabled were unable, "in view of their physical handicaps, to make any appreciable use of many of the facilities described by the

defendant" (A. 115-A. 116). This statement, superficially irrefutable, egregiously ignores the fact that in New York the welfare allowances are uniform for all recipients, of whom the overwhelming preponderance are AFDC recipients.* The standards on which the differential was based are plainly applicable to AFDC recipients, who by definition are children and their unemployed parents.

Thus, the Legislature had the right to base its differential on a reason applicable to the greatest number of recipients since in New York all classes of welfare recipients receive the same allowance. When the Court permitted intervention of AFDC recipients as parties plaintiff and extended the preliminary injunction to their class (A. 164-A. 166) it completely repudiated its prior assertion that the State Legislature's compassionate reasons for providing a slight additional allowance in the case of children residing in the City of New York must be ignored because the plaintiffs were recipients of adult assistance.

The Court likewise disregarded the fact (A. 93) that the New York City Department of Social Services, in applying for permission to establish a 1968 program in which special grants to welfare recipients were replaced by a cyclical grant of $100 per year, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." This application was approved by defendants and by HEW, and was reflected in the differential in § 131-a. The cyclical grant in New York entitled a family of four in the City to $400 more a year or $25 more a month than recipients residing outside the City. This was a flat grant usable for any purposes chosen

*New York State has 880,860 recipients of AFDC out of a total of 1,210,601 welfare recipients (1968 figures). Under a demonstration project, effective September 25, 1969, AABD recipients are receiving increments of $8 per month, state wide, if living alone, and $5 if living with a family. See page 8, *supra*

by the recipients. It is interesting to note that this amount of $25 a month difference between New York City and the rest of the State is precisely the difference between $208 provided as a general allowance in New York City and the $183 provided by statute for the rest of the State (§ 131-a[2, 3]).* It is true that this cyclical grant replaced certain special grants which were available to recipients outside the City but those special grants were earmarked for a particular purpose for which individual eligibility had to be shown, and did not become part of the recipient's projected income. Thus, the Legislature was free to recognize that if in fact New York City and the rest of the State were treated equally, the City recipients would suffer a loss of income not suffered by the other recipients.

It is ironic that the District Court cast its attack on the statute in terms of objecting to the use of AFDC criteria in providing a differential to all City of New York recipients (of whom AFDC recipients constitute the overwhelming preponderance). Not all states pay identical allowances to AFDC and adult recipients. And in states which pay less to AFDC families that disparity has been attacked as a denial of equal protection. See *Jefferson* v. *Hackney*, 304 F. Supp. 1332 (N. D. Tex. 1969); *Lampton* v. *Bowen*, 299 F. Supp. 336 (E. D. La. 1969).

What the Court below demanded of New York was just that "mathematical nicety" which this Court has declared *not* to be required by the equal protection clause. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79. As the Court held in *Jefferson* v. *Hackney*, "There remain priorities in time and functions in alleviating human misery. Unless the Court mandates that all human needs be met, we must accept classifications and piecemeal solutions

* This difference was reduced by the Department's order of June 5, 1969 halving the differential. See page 8, *supra*.

which are not egalitarian between all programs and all human beings." See also *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 489.

The *Jefferson* decision rejected the very conclusion on which the Court here so heavily relied—that the subject matter of this statute in some strange way automatically rendered inapplicable the rule that legislative distinctions be sustained unless patently irrational, and placed the burden on the State to demonstrate some "compelling interest" in the differential. As the Court in *Jefferson* ruled, the considerations which thrust that burden on the states in the cases cited by the plaintiffs there (and by the plaintiffs and the three-judge court here) are inapplicable to a statute establishing welfare allowance levels. No impairment of the right to travel is involved, as in *Shapiro* v. *Thompson* (394 U. S. 618), or on the right to vote, as in *Harper* v. *Virginia Board of Elections* (383 U. S. 663). ~~There is no analogous constitutionally protected right to~~ There is no analogous constitutionally protected right, such as the Court below created, to any particular level of welfare benefits. Nor could there be, in view of current proposals by numerous enlightened commentators, as well as the current Administration proposal pending in Congress, to dismantle the entire welfare structure and replace it with some completely new program, such as guaranteed income. Thus the disposition below, which shifted the burden of showing legislative intent from the attackers to the defenders of the state, was plainly improper.

In *Jefferson*, the Court went on to hold that statutes providing for welfare allowances "must be determined by traditional equal protection standards," citing *McDonald* v. *Board of Election Commissioners*, *supra*, in which this Court rejected a parallel argument that the "compelling state interest" standard be applied to a statute denying absentee ballots to persons jailed awaiting trial. In *McDonald*, as here, the distinctions were not "drawn on the basis of wealth or race, * * * two factors which would independently render a classification highly suspect and

thereby demand a more exacting judicial scrutiny.'' 394 U. S. at 807. After holding, as we have seen, that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent" (*id.* at 809), this Court ruled (*id.*):

> "With this much discretion, a legislature traditionally has been allowed to take reform 'one step at time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89 (1907)."

Indeed, this Court's opinion in *Shapiro* v. *Thompson*, *supra*, on which the Court below relied, is evidence that welfare is not a subject entitled to particular constitutional protection, else the right protected in *Shapiro* would have been the right to welfare rather than the right to travel which was affected less directly by the offending legislation. This is not to dispute the fact that the level of welfare benefits is very important to the plaintiffs, as it clearly is. But importance to one's life is not the measure of whether the area of legislation is protected by the Bill of Rights. The rights of voting, freedom of religion, free speech and public assembly are not of direct economic importance in the daily lives of most of us, but they are at the heart of our form of government. Thus, they occupy a place of special importance in the Constitution.

The Bill of Rights, to which the Court below would analogize the privilege of receiving welfare, protects

*against* government interference. But the order below cannot be reasonably construed as protecting the plaintiffs from interference by the government. Quite the contrary, the order demands further affirmative action on the part of the State. For this reason, all else aside, the lower Court exceeded its jurisdiction—in ordering the Legislature to spend State moneys. *Rosado* v. *Wyman*, *supra*, 414 F. 2d 170, 176; *Williams* v. *Dandridge*, 297 F. Supp. 450, 459 (D. Md. 1968), *sub judice* here (No. 131, Oct. Term 1969); *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1116 (D. Me. 1969).

It is clear that the only right plaintiffs can claim is the right to be equally treated. There is no contention here that poor persons are treated differently from the rich, or black from white. The differential here is geographical. No badge of inferiority is connected with being a Nassau or Westchester County welfare recipient as opposed to being a New York City welfare recipient. Thus the test is the test of minimum rationality and the strong presumption of constitutionality of the statute (*Ferguson* v. *Skrupa*, *supra*) governs this case. By any fair application of those standards, the statute does not offend the equal protection clause.

The opinion below leaves no doubt that its objective is to obtain higher levels of benefits to the plaintiffs (A. 106, A. 108 A. 109, A. 112, A. 115 A. 117, A. 120). Suppose the statute had made the levels outside New York City inflexible and New York City's higher level flexible—that is, permitted the Commissioner to lower the level of New York City's benefits. It is inconceivable that the District Court would have adopted the same reasoning and reached the same conclusion. Plainly, in straining to place welfare-allowance statutes in a rarified atmosphere of unusual vulnerability, the Court below was exceeding its function on judicial review and allowing its views of policy to swamp its objectivity.

Under the applicable test—whether "no grounds can be conceived to justify" the differential (*McDonald*, *supra*, at

p. 809), plaintiffs' assertions collapse. No doubt reasonable minds might differ as to the existence, or extent, of the greater social cost of residing in the City of New York.* But once that be conceded—as it must—judicial inquiry is foreclosed. *Ferguson* v. *Skrupa, supra* (372 U. S. at 730):

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in an unanimous opinion in 1941,** 'We are not concerned . . . with the wisdom, need or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'"

In fact what the court below did here was precisely what this Court condemned in *Ferguson* and *McDonald*. It violated the tenet of Mr. Justice HOLMES' dissent in *Tyson & Bro.—United Theatre Ticket Offices* v. *Banton*, 273 U. S. 418, 445-446, by failing "to recognize that a state legislature

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*It is noteworthy that the actual average payments per recipient even prior to the enactment of § 131-a were, because of a much greater frequency of special grants, substantially higher within New York City:

| Programs | New York City | Suburban Counties | Urban Upstate Counties | Remainder of State |
|---|---|---|---|---|
| AFDC | $ 72.28 | $60.32 | $50.51 | $39.07 |
| AFDC-Unemployed Fathers | $ 72.89 | $57.68 | $42.30 | $34.92 |
| Medical Assistance | $123.57 | $91.55 | $69.65 | $57.48 |
| Home Relief | $ 43.68 | $30.53 | $27.84 | $20.11 |

**Olsen* v. *Nebraska*, 313 U. S. 236, 246.

can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that the Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain."

### C. The slight differential among the Social Services Districts is a geographical distinction, presumptively valid.

In some sense the differential in payment between New York City and the rest of the State, based, as we have seen, on compassion, is analogous to a matching grant program since county welfare officials are empowered to make application for increased amounts on the approval of the appropriate legislative body. This demonstrates the State Legislature's concern for the ability to pay of the various welfare districts since they would be required to pay one-quarter of any increase over the established levels. See the cases upholding differentials in school aid (p. 39, *infra*).

Such geographical differentials in welfare payments are not unusual. In California, for example, counties are authorized to pay amounts over the state allowance, and these amounts vary from $5.35 per person per month in San Francisco County to $.13 in Fresno County. Los Angeles County pays $2.40 per month, while neighboring Orange County pays $1.02. Calif. Welfare & Insts. Code §§ 11450-52; see "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs," 15 UCLA Law Rev. 787, 812-815 (1968).

Implicit in plaintiff's argument is an insistence that the Constitution requires every welfare recipient to receive the same allowance (unless the State can show a difference in cost of living). But this is a grotesquely unreal supposition. Whether or not based on the ability of various districts to pay, there are striking inequities in welfare payments among the various states. AFDC recipients in New York receive an average of $278 per month for a family

of four; in Mississippi, $55. Among Northeastern states, where the cost of living is essentially the same, the average monthly allowance to an AFDC recipient varies from $71.75 in New York to $52.00 in Connecticut, $47.80 in Rhode Island, $38.55 in Pennsylvania and $32.25 in Delaware. See Appendix, *Rosado* v. *Wyman*, page 106. If it be argued that each state is sovereign and free to set its own level, it should be noted that the federal government pays approximately half of these amounts.

Moreover, there is no constitutional requirement that identical grants be made to each locality within a given state. See *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N. D. Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322, rejecting a claim of denial of equal protection resulting from variations in aid-per-pupil to school districts ("Nor does the Court establish the rigid guideline of equal dollar expenditures for each student.") Also see *Burruss* v. *Wilkerson*, —— F. Supp. —— (D. C. Va., decided May 23, 1969) aff'd —— U. S. —— (No. 864 Oct. Term, 1969, decided February 24, 1970), 38 USLW 3319. Geographical distinctions are not "inherently suspect" as are those, for example, based on race or wealth. And the States' reasonable classifications in this area are not subject to constitutional challenge. *Detroit Edison Co.* v. *East China Tp. School Dist. No. 3*, 247 F. Supp. 296 (E. D. Mich. 1965), aff'd 378 F. 2d 225, cert. den. 389 U. S. 932.

New York legislation has treated the City of New York as *sui generis* in numerous cases. See *Matter of Hogan* v. *Rosenberg*, *supra*; *Spatt* v. *City of New York*, *supra*; *DiPrima* v. *Wagner*, 14 A. D. 2d 36 (1st Dept. 1961), aff'd 10 N. Y. 2d 728; *Adler* v. *Deegan*, 251 N. Y. 467 (1929). The entire Multiple Dwelling Law of New York is limited in its application to the City of New York. The Court system and large portions of the Code of Criminal Procedure differ markedly as between the City of New York and the remainder of the State. These instances of the pattern

of legislative differentiation between the City and the rest of the State are far more pervasive than the one attacked here.

In *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328, this Court upheld the authority of Congress to deal with the problem of voting discrimination in areas where it was established to be most serious. There, unlike the instant case, the constitutionally protected right to vote was involved yet the classification adopted by Congress was sustained in the absence of an affirmative showing of irrationality. The plaintiffs have made no such showing here.

Indeed, far from showing the requisite invidious distinction, the plaintiffs failed to show any distinction at all. As we have shown, the plaintiffs actually receive higher welfare benefits than average New York City recipients since the amount paid to them for rent, over and above the monthly grant, is so much higher. This alone demonstrates the conjectural nature of the claim of invidious discrimination here, and the impropriety of the injunctions. This is bolstered by New York City's higher maintenance and security costs and higher crime rate (see pp. 25-27, *supra*).

The only factual evidence offered by the plaintiffs was to the effect that the costs of transportation in Nassau County exceeded that in New York City, but this undisputed fact would be relevant only if the Legislature had not provided a differential for New York City recipients based upon a greater need for transportation to recreational and cultural facilities. Since City welfare recipients were determined by the Legislature and by defendant Commissioner to require transportation with far greater frequency, the Legislature clearly had a right to grant an additional stipend for that purpose. And, it is to be noted, the Commissioner, pursuant to the discretion vested in him by [illegible], has already substantially increased the allowance paid to recipients outside New York City, thereby nearly halving the differential. See page 8,

In any event, as we have shown, the differential here was prompted by humane motives. It cannot be said to be "invidious" unless that word be stripped of all content and reduced to a logical cliche.

**D. The State legislation fully complies with the Social Security Act and that issue must, in any event, be determined administratively in the first instance.**

objective" of protecting recipients "from adoption of different schedules standards or other criteria for different areas" (A. 119). The court itself deferred determination of this contention "in anticipation of a ruling by HEW" (A. 119), and did not base its injunction on that claim.

This disposition was plainly correct and should have been a basis for denial of the preliminary injunction. See *Catholic Medical Ctr. v. Wyman*, 305 F. Supp. 1256, 1260 (E.D.N.Y. 1969), in which the three-judge court (Mansfield, C.J., Mishler, D.J. and Judge, D.J.) deferred determination of the validity of New York's Medicaid provisions, also challenged on both constitutional and statutory grounds, "until the United States Secretary of [HEW] has an opportunity to express his views." The court relied on *Udall v. Hollo Hill Farms Products, Inc.*, 377 U.S. 447, 449, that "[s]ince HEW is not a party to this litigation, it was not present to defer decision of the motions for a short period in order to hear from the Department. It may be that HEW has dealt with similar problems in some other state, that it has relevant negotiations under way, or that it will point to some part of the statutory scheme for its participation that we have overlooked."

To have enabled the State with the sweeping preliminary injunction such as was imposed here, and then to extend the injunction to a far larger group of recipients in advance of trial, was an abuse of discretion. The court below employed the wrong test in determining the validity of the state welfare programs, ignored the demonstration of rational legislative purpose provided by defendants, and impermissibly substituted its opinion on policy matters for that of the state legislature.

* The court also dismissed HEW as a party on the ground that it had no claim against the defendants on the merits which are involved here. 305 F. Supp. 1256 (1969).

## CONCLUSION

**For the foregoing reasons the order of the District Court should be reversed and the case remanded with directions that defendants' motion for summary judgment be granted.**

Dated: New York, New York, March 13, 1970

Respectfully submitted,

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